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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 543

EDGAR J. SCHOEN,

Petitioner,

vs.

MOUNTAIN PRODUCERS CORPORATION, A DELAWARE CORPORATION, ARTHUR E. JOHNSON, D. R. MURPHY AND HAROLD D. HERNDON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

The petitioner, Edgar J. Schoen, prays that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cause November 9, 1948 (Rec. 219; 170 Fed. (2) 707), insofar as said decree affirmed the final judgment of the District Court for the District of Delaware (Rec. 21; 76 Fed. Supp. 554).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The petitioner, a citizen and resident of Illinois, instituted a derivative stockholders' action on behalf of respondent Mountain Producers Corporation in the District Court for the District of Delaware, against Mountain Producers Corporation (hereinafter called "Mountain Producers") and other corporate defendants and seven individual defendants (Rec. 29). The complaint alleges substantial breaches of fiduciary relationship upon the part of various defendants as against respondent Mountain Producers (Rec. 24-101).

A. Process.

Of the defendants named in the complaint filed on May 26, 1947, the following defendants were personally served with process in Delaware: Mountain Producers, a Delaware corporation, Argo Oil Corporation (hereinafter referred to as "Argo"), a Delaware corporation, Saltmount Oil Company (hereinafter referred to as "Saltmount"), a Delaware corporation, Stanolind Oil and Gas Company (hereinafter referred to as "Stanolind"), a Delaware corporation, Arthur E. Johnson (hereinafter referred to as "Johnson") and D. R. Murphy (hereinafter referred to as "Murphy"), residents of the State of Colorado, and Harold D. Herndon (hereinafter referred to as "Herndon"), a resident of the State of Texas (Rec. 3).

No process has been obtained upon the following defendants named in the complaint: Standard Oil Company (Indiana) (hereinafter referred to as "Standard Indiana"), an Indiana corporation, and G. E. Griffith, W. J. Geddes,

T. A. Dines and T. C. Tonkins, individuals who are nonresidents of the States of Illinois and Delaware (Rec. 3).

B. Motions to Dismiss.

The respondents Johnson, Murphy and Herndon filed timely motions to dismiss the complaint as to them upon the ground of lack of venue (Rec. 3, 4, 14, 15).

Respondents do not contend that insofar as Section 24 of the Judicial Code (Title 28 U. S. C. A., Sec. 41(1)) is concerned the complaint fails to meet the requirements of diversity of citizenship necessary for original jurisdiction of the District Court over the subject matter of the suit. The motion of respondents Johnson, Murphy and Herndon was made upon the ground that under Section 51 of the Judicial Code as it read when the complaint was filed, inasmuch as the plaintiff is not a resident of the State of Delaware and inasmuch as the respondents Johnson, Murphy and Herndon are not residents of Delaware, the joinder of these defendants with corporate defendants organized under the laws of Delaware other than respondent Mountain Producers created an impropriety of venue (Rec. 14, 15).

Respondents contend that when all of these defendants are sued in one action, then Section 51 of the Judicial Code must be so construed and interpreted as to create improper venue against the individual defendants nonresidents of the District of Delaware. This result is arrived at by predicating proper venue upon *citizenship, not residence,* in a suppositious suit which might have been brought by the aggrieved corporation in the United States District Court for the District of Delaware against all of the defendants. In such a suppositious suit it will be seen that there would be a lack of diversity of *citizenship* under Section 24 of the Judicial Code for the reason that there would be aligned on

one side of such a suit as plaintiff, the respondent Mountain Producers, a citizen of Delaware, and on the other side of such a suppositious suit three citizens of Delaware, the corporate defendants Argo, Saltmount and Stanolind.

C. Judgments Below.

The judgment of the District Court for the District of Delaware entered March 6, 1948, dismissed the complaint as to all of the defendants upon the ground of improper venue (Rec. 7, 21).

The judgment of the Court of Appeals for the Third Circuit entered November 9, 1948, reversed the decree of the District Court as to the corporate defendants and as to these defendants ordered the cause remanded to the District Court for further proceedings; but affirmed the decree of the District Court dismissing the complaint as to respondents Johnson, Murphy and Herndon upon the ground of improper venue (Rec. 219).

Petitioner filed a petition for rehearing (Rec. 220-228) which the Court of Appeals denied on December 10, 1948 (Rec. 240).

During the pendency of the appeal, the 80th Congress enacted into law, effective September 1, 1948, a revised Title 28 of the United States Code. In Section 1406(a) of Revised Title 28, it is specifically provided that if venue is laid in the wrong District, the District Court shall transfer the case to any District in which it could have been brought. This statutory enactment took place during the pendency of the proceedings in the United States Court of Appeals and was brought to the attention of the Court of Appeals by petitioner (Rec. 215, 226).

D. Opinion of the District Court.

The District Court in an opinion rendered February 25, 1948 (Rec. 19, 20), determined that proper venue in the case at bar must be determined by the provisions of Section 51 of the Judicial Code; that the general rule under that statute is that to meet the requirements of venue in a diversity case, suit must be brought in the District of the plaintiff's or defendant's residence; that by an amendment to the statute in 1936, an exception was made to this general rule to the effect that in a stockholder's derivative action, suit may be brought in any District in which the aggrieved corporation might have brought the same against the same defendants; that the exception deals with venue and does not change the requirements of diversity jurisdiction; that "the question has been asked, where is diversity jurisdiction present in this case?" (Rec. 19); that on the authority of *Malcolm* v. *MacDonald*, (D. C. Del.) 37 Fed. Supp. 580, it would appear that there is no true diversity in the case at bar, plaintiff's right to sue being limited by statute to Districts where the harmed corporation might have sued the defendants; and that the District of Delaware being the residence neither of the plaintiff nor of the individual defendants, and respondent Mountain Producers being a Delaware corporation vis-a-vis other Delaware corporate defendants, diversity is lacking and venue is improper. Upon the basis of this opinion, the District Court entered its decree of March 6, 1948, dismissing the complaint (Rec. 21).

E. Opinion of the Court of Appeals.

In the opinion of the Court of Appeals filed November 9, 1948 (Rec. 207-218), it is stated that the question is one of first impression in courts of appeal (Rec. 210) (with which,

as shall be seen, petitioner is not in agreement), that the language of the statute itself is quite clear and unambiguous (Rec. 210) and that what the statute says is that the stockholder may bring his suit on behalf of the injured corporation in any district in which suit against the other defendants "might have been brought by such corporation"; that whether a corporation may bring suit in a given district depends just as much upon whether the district court of that district would have jurisdiction of the subject matter as upon whether the district is one in which the venue statute authorized suit to be brought (Rec. 210-211); that this construction of the statute imparts a jurisdictional element into a statute relating to venue but that there is nothing to prevent Congress from drawing a venue statute in such terms; and that the Court of Appeals is of the opinion that in the instant statute it so did (Rec. 211). The Court of Appeals reversed the District Court as to the corporate defendants for the reason that as to them the suit had been brought in the district in which they reside (Rec. 216); that venue as to them is judged by the general rule and not by the exception enacted into law in the Amendment of 1936 (Rec. 216); and that in any event these defendants had waived the question of venue because of failure to make timely motions to dismiss thereunder (Rec. 215, 216).

As to Section 1406(a) of Revised Title 28, U. S. Code, the Court of Appeals, after quoting it, stated in its opinion (Rec. 215) that this statute was not in force on March 6, 1948, when the decree of the District Court was entered, and that upon appeal, the Court of Appeals is called upon to determine only whether the District Court erred at the time it acted so that, as the Court reasoned, to apply the subsequently enacted provisions of Section 1406(a) would involve the retroactive annulment of a judgment validly entered by the District Court which the Court says the statute did not and could not do.

BASIS OF JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) . Order staying the mandate pending the application for writ of certiorari in this Court has been entered.

QUESTIONS PRESENTED.

1. The principal question which has arisen in the case at bar is as follows: Where a stockholders' suit has been brought by a non-resident plaintiff in the district in which the aggrieved corporation is a resident, against that corporation and other defendants some of whom are residents of the district and some of whom are nonresidents of the district, was there under the law as it existed on May 26, 1947, when the complaint was filed, proper venue under Section 51 of the Judicial Code, as to the defendants nonresidents of the district?

2. A second question relates to the enactment into law of Revised Title 28 of the United States Code by the 80th Congress. This question is as follows: Assuming that on May 26, 1947, under Section 51 of the Judicial Code as it then existed, venue was improper against the respondents Johnson, Murphy and Herndon, did the enactment into law of Section 1406(a) of Revised Title 28, U. S. Code, effective September 1, 1948, require the United States Court of Appeals when it rendered its decree on November 9, 1948, to remand the case to the District Court with directions to transfer the same to any district in which the case could have been brought?

REASONS FOR GRANTING PETITION.

1. Petitioner urges for consideration that the United States Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. Its decision is directly contrary to that of the United States District Court for the Southern District of New York in *Saltzman* v. *Birrell*, 78 Fed. Supp. 778 (1948), which held that Section 51 of the Judicial Code related only to venue and did not require a double diversity of citizenship test, one in the instant suit and a second in a suppositious suit, but was merely intended, assuming jurisdiction in the hypothetical suit, to designate the District in which the injured corporation resides as appropriate venue for a stockholders' derivative suit. The Court of Appeals recognized this conflict (R. 209-210).

This construction of the statute by the District Court for the Southern District of New York avoids the incongruous result reached by the decisions of the District Court and the United States Court of Appeals in the instant case, namely, that but for the Eighth Cause of Action had petitioner filed two suits, one in the United States District Court for the District of Delaware against the corporate defendants and one in the same Court against the individual defendants and the aggrieved corporation, venue would have been proper in both of these suits; but because petitioner avoided such multiplicity of litigation, and for that formalistic reason only, venue is improper against the respondents Johnson, Murphy and Herndon; and that as to the Eighth Cause of Action in which two Delaware corporations are indispensable parties, venue is proper only in the district of the residence of the plaintiff where the defendants are not amenable to process.

2. The decision of the United States Court of Appeals is also at variance with the decision of the Court of Appeals for the District of Columbia in *King* v. *Wall & Beaver Street Corp.*, 145 Fed. (2d) 377 (1944), in which it was held that the 1936 amendment of Section 51 of the Judicial Code added the District of the aggrieved corporation as a District in which venue properly lies in stockholders' actions. It is disputative of the decision of the United States Court of Appeals for the Second Circuit in *Greenberg* v. *Giannini, et al.*, 140 Fed. (2d) 550 (1944), in which it was held at page 552 that in practice the 1936 amendment of Section 51 of the Judicial Code added only the district where the aggrieved corporation resides as a district for proper venue in stockholders' actions and, at page 553, that Section 51 concerns itself with venue alone, not jurisdiction, as also does the 1936 amendment thereto.

3. Petitioner further urges as a persuasive reason for granting this petition that the United States Court of Appeals in the instant case improperly applied Section 1406(a) of Revised Title 28, U. S. Code, in its decision that as to this statute the Court of Appeals is called upon only to determine whether the District Court erred at the time that it acted and is not called upon to apply the subsequently enacted provisions of Section 1406(a).

This portion of the decision of the United States Court of Appeals is directly contrary to the decision of the United States Court of Appeals for the District of Columbia Circuit, No. 9716, *Brotherhood of Locomotive Firemen and Enginemen* v. *LeRoy Graham, et al.*, decided October 26, 1948 (Rec. 229-239; not as yet reported in Federal Reporter), in which that Court of Appeals, having decided that venue was not proper under Section 51 of the Judicial Code when the decree of the District Court was entered and that at that time the action should have been dismissed, Section 1406(a) not having then been enacted into law, determined that except where vested interests have inter-

vened, an appellate court must decide a case according to the law as it exists, whether in statutory form or in the form of judicial decision, at the time of its decision rather than according to the law as it existed at the time of the decision below; and consequently applied the provisions of Section 1406(a) and ordered the case remanded with directions that it be transferred to the proper district (Rec. 239).

As to this part of the decision of the Court of Appeals in the instant case, we have two decisions in different Courts of Appeals, directly in conflict, to which the attention of the United States Court of Appeals for the Third Circuit was directed in petitioner's petition for rehearing (Rec. 226).

4. As to the applicability of Section 1406(a), the decision in the instant case by the United States Court of Appeals is at variance with the decisions of this Court in *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23, 26, and *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115; and is not in harmony with the decisions of this Court in *United States* v. *Schooner Peggy*, 1 Cranch. 103, 110; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 542; and *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78 (87 L. Ed. 621; 63 S. Ct. 465). The Court of Appeals for the Third Circuit fails also to adhere to one of its earlier opinions written by Judge Maris, who wrote the opinion of the court in the case at bar (Rec. 207). In the case of *Abraham* v. *National Biscuit Co.*, 89 Fed. (2d) 266 (1937), a decision of the Supreme Court of the State of Pennsylvania construing a remedial statute of that State, was rendered after the judgment of the District Court from which appeal was pending and during the pendency of the appeal, which construed the statute differently than the statute had previously been construed by the United States Court of Appeals for the Third Circuit. The Court of Appeals in that

case respected the construction of the statute made by the Supreme Court of the State of Pennsylvania, Judge Maris stating at page 268 that since the statute is merely procedural, it follows that the parties can have acquired no rights under the prior construction of it.

5. There is a further reason for granting the petition. The case at bar was instituted on May 26, 1947. A period of close to two years has elapsed since the institution of that suit. Provisions of the statutes of limitations or laches are working against petitioner as to any new suit.

6. Two of the individual respondents are residents of Colorado and one a resident of Texas. A burdensome inconvenience would be placed upon petitioner in pursuit of the rights of the aggrieved corporation against them, to be required to institute one suit in Colorado and another in Texas, while at the same time prosecuting suit against the corporate defendants, other than Standard Oil Company (Indiana), in Delaware and against the latter-named company, which cannot be served in Delaware, in Illinois in which State Standard Oil Company (Indiana) is the only one of the wrongdoers amenable to service of process.

7. The construction of the 1936 amendment to Section 51 of the Judicial Code introducing citizenship concepts into the requirements for venue leads to strange results as to the presently enacted Sections 1401, 1404(a) and 1406(a) of Title 28, U. S. Code, for the reason that citizenship concepts adopted in the construction of these statutes would practically emasculate the decision of this Court in *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, as to forum non conveniens. Applying such concepts to Section 1401, this case against all the defendants could only have been instituted in the district of the residence of the plaintiff; under Section 1406(a), the District Court in Delaware would be required to transfer the case to the Northern District of Illinois, Eastern Division,

where the plaintiff resides; and, whatever the merits as to forum non conveniens, under Section 1404(a), the District Court for the Northern District of Illinois, Eastern Division, would be precluded from transferring the case to another district or division for the reason that, in the language of the statute, there would be no "other district or division where it might have been brought."

For the foregoing reasons, it is respectfully submitted that this petition for the writ of certiorari should be granted.

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BRIEF.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit (Rec. 207-218) is reported in 170 Fed. (2d) 707. The opinion of the United States District Court for the District of Delaware (Rec. 19-20) is reported in 76 Fed. Supp. 554.

GROUNDS FOR JURISDICTION.

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1. These have already been stated in the Petition for Writ of Certiorari (p. 7, *supra*).

STATEMENT OF THE CASE.

The plaintiff on May 26, 1947, filed a complaint against the respondents Johnson, Murphy, Herndon and Mountain Producers; and against defendants Saltmount, Argo and Stanolind and other defendants who were not served with process (Rec. 3, 29, 30). Personal service of summons was had on all of the respondents and on the defendants Argo, Saltmount and Stanolind (Rec. 3). The action instituted is a stockholders' action on behalf of respondent Mountain Producers (Rec. 29, 33) whose stock is traded on the New York curb exchange and widely held (Rec. 33).

The complaint is sworn to by petitioner (Rec. 103, 104) who alleges therein and in a further affidavit (Rec. 136-183) that he has been an owner or holder of capital stock of respondent Mountain Producers since March 7, 1928, and owns 500 shares of its capital stock (Rec. 29); that he is an attorney practicing law in Chicago, Illinois, since 1920 (Rec. 142); that he and his wife own 1,000 shares of the stock of respondent Mountain Producers (Rec. 137); and that his action is representative of the rights of one R. L. Dunkle, who owns and controls 2,780 shares thereof (Rec. 142, 144), of H. C. Wadlington, who own 1,710 shares thereof (Rec. 192, 193), and of many other stockholders who have made voluntary contributions toward the expense of this litigation (Rec. 144, 145).

The complaint shows that petitioner did not rush into litigation; that he first had knowledge of any wrongdoing on March 30, 1945 (Rec. 31), and attended the annual meeting of stockholders of respondent Mountain Producers held in Wilmington, Delaware, in the month of May, 1945, at which meeting a stockholders' committee was appointed to investigate into the alleged wrongdoing (Rec. 32); that

he stood by until this committee, two of the three members of which the alleged wrongdoers had appointed to investigate themselves, had rendered its report on April 1, 1946, as a divided report (Rec. 32, 33); that he solicited proxies for the annual meeting of stockholders held in May, 1946, at which meeting he attempted to secure action from the stockholders and at which meeting he represented, by the count of his opponents, 164,595 shares (Rec. 31, 32, 138); that on March 7, 1946, he made a demand upon the board of directors of respondent Mountain Producers requesting that action be taken for and on behalf of the corporation to right the alleged wrongs; and that on August 15, 1946, this demand was denied (Rec. 33).

There are nine causes of action asserted in the complaint (Rec. 34, 48, 57, 62, 70, 80, 87, 91, 97). The First, Second, Fourth, Fifth, Sixth and Seventh Causes of Action (Rec. 34, 48, 62, 70, 80, 87) involve alleged wrongdoing by Standard Indiana and defendant Stanolind, wholly owned subsidiary of Standard Indiana which owns or controls approximately 40 per cent of the outstanding capital stock of respondent Mountain Producers (Rec. 35). Of these Causes of Action, respondents Johnson, Murphy and Herndon are named as defendants in the First, Sixth and Seventh Causes of Action, and respondents Murphy and Herndon in the Fourth Cause of Action (Rec. 34, 62, 80, 87). In the Third Cause of Action defendant Argo and respondents Johnson, Murphy and Herndon are named as defendants (Rec. 57); this Cause of Action relates to deprivation of corporate opportunity to respondent Mountain Producers to purchase its capital stock. In the Ninth Cause of Action, respondents Murphy and Herndon, of the defendants served with process, are alone named as defendants (Rec. 97); this Cause of Action relates to waste of corporate assets by payments to certain committees and legal firms.

In the Eighth Cause of Action, Johnson, Murphy, Herndon, Mountain Producers, Argo and Saltmount are named as defendants (Rec. 91). In view of the ratiocination of the Court of Appeals, this Cause of Action assumes decided importance. This is a double-derivative cause of action. It is alleged that respondent Mountain Producers and Midwest Oil Company, an Arizona corporation, 40 per cent of whose outstanding capital stock is also owned by Standard Indiana (Rec. 35), have invested many millions of dollars of surplus funds in the defendant Saltmount in which they each own 50 per cent of the capital stock (Rec. 91, 92); during the year 1941, respondent Johnson was a member of the board of directors of Saltmount and continued as such until sometime during the year 1946 (Rec. 92); respondent Johnson is also president of Midwest Oil Company and president and a director of defendant Argo, of which he is one of the substantial stockholders (Rec. 34, 93); during the period of time of the alleged wrongdoing respondent Johnson was in active charge and control of the purchase of oil leases and royalties by defendant Argo (Rec. 93); and during said period he owned none of the capital stock of respondent Mountain Producers (Rec. 93).

It is stated that respondents Herndon and Murphy became directors of defendant Saltmount during the year 1943 (Rec. 92); that during the entirety of the period of alleged wrongdoing respondent Herndon was in charge of the principal office of defendant Saltmount in San Antonio, Texas, and has since the year 1943 been president of defendant Saltmount (Rec. 37, 93); that defendant Herndon has been in charge and control of the purchase of oil leases and royalties by defendant Saltmount under the control and supervision of the board of directors (Rec. 93); that since 1945 respondent Herndon has been president and a director of respondent Mountain Producers (Rec. 36, 37); and that respondent Murphy has been an

officer and director of respondent Mountain Producers since February, 1944 (Rec. 36).

The defendants Saltmount and Argo have been engaged in the business of acquiring oil leases and royalties in the same States and the same oil fields (Rec. 93).

The royalty acres purchased by defendant Argo from December 31, 1940, to December 31, 1944, were purchased at a cost of approximately $400,000 less than those purchased during the same period by defendant Saltmount; and during that period defendant Saltmount increased its royalty acreage only 4,600 acres as against an increase of royalty acreage by defendant Argo of some 44,000 acres (Rec. 93, 94). During the same period, as to royalties purchased by each Argo and Saltmount abandoned as worthless, the cost to Argo was approximately $121,000 and to Saltmount approximately $364,000 (Rec. 94). It is charged that defendant Saltmount paid excessive prices for royalty acreage; paid prices greatly in excess of the prices paid by defendant Argo, for similar acreage to that acquired by defendant Argo; and that the cost per acre of royalty acres acquired during said period which have proved to be productive has been far higher to defendant Saltmount than to defendant Argo (Rec. 94).

It is further charged that during the period of time that defendant Johnson was a director of Saltmount, he purchased acreage for Argo which he knew represented business opportunities to Saltmount at more advantageous prices than the prices at which similar acreage was being purchased by Saltmount (Rec. 95).

As to the wrongs alleged in this Cause of Action, the incorporeal Argo acted through the personality of the respondent Johnson who, as a substantial stockholder thereof, benefited thereby; and the corporate body Saltmount acted through the individuals Johnson, Herndon and

Murphy during their respective tenures of office (Rec. 92, 93).

The respondents Johnson and Murphy are citizens and residents of the State of Colorado (Rec. 30); respondent Herndon is a citizen and resident of the State of Texas (Rec. 30); defendants Argo, Saltmount and Stanolind are corporations organized under the laws of the State of Delaware (Rec. 30); and respondent Mountain Producers is a corporation organized under the laws of the State of Delaware (Rec. 29).

Respondent Mountain Producers does not do business in Illinois (Rec. 154) of which State plaintiff is a citizen and resident (Rec. 29).

Respondents Johnson, Murphy and Herndon filed timely motions to dismiss the complaint as to them upon the ground of lack of venue (Rec. 3, 4, 14, 15).

SPECIFICATION OF ASSIGNED ERRORS.

1. The Court of Appeals erred in the determination made that venue was improper as to respondents Johnson, Murphy and Herndon under Section 51 of the Judicial Code.

2. The Court of Appeals further erred in its failure to apply Section 1406(a) of Title 28, U. S. Code, and to remand the case to the District Court with directions to transfer the same to any district or division in which it could have been brought.

SUMMARY OF ARGUMENT.

I.

Jurisdiction of the federal courts depends upon a citizenship concept; and venue therein depends upon a residence concept; jurisdiction is beyond the power of litigants to confer, but venue relates to the convenience of litigants and is subject to their disposition.

Neirbo Co. v. *Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165, at 167.
Camp v. *Gress*, 250 U. S. 308, at 316.
Title 28, U. S. C. A., Section 41(1).
Title 28, U. S. C. A., Section 112.

A. The jurisdictional requirements relating to citizenship have been fully met in the case at bar; and as to the jurisdictional requirements the injured corporation will not be aligned as a party plaintiff.

Doctor v. *Harrington*, 196 U. S. 579, at 587-588.
Koster v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, at 522-523.

B. The concept of citizenship is entirely different from the concept of residence. The federal statutes which as to venue specifically recognize multiple residences of corporations make no provisions as to jurisdiction for multiple citizenships.

Title 28, U. S. Code, Chap. 85.
Title 28, U. S. Code, Chap. 87, Sec. 1391(c).

II.

The legislative history of Section 51 of the Judicial Code does not support a construction thereof based upon citizenship concepts in a suppositious suit which might have been brought by the injured corporation; on the contrary, its history calls for a construction of the statute based upon residence concepts.

Title 28, U. S. C. A., Sec. 112, Historical Note, p. 44.

79 Cong. Rec., pp. 11959, 14110, 14528, 14529.

80 Cong. Rec., p. 5223.

Northern Securities Co. v. *United States*, 193 U. S. 197, at 401.

Rodenbaugh v. *United States*, 25 Fed. (2d) 13 at 15.

III.

The natural and rational meaning of the words of Section 51 of the Judicial Code does not support a construction thereof based upon citizenship concepts.

Northern Securities Co. v. *United States*, 193 U. S. 197 at 401.

Rodenbaugh v. *United States*, 25 Fed. (2d) 13 at 15.

Saltzman v. *Birrell*, 78 Fed. Supp. 778 at 784.

Greenberg v. *Giannini*, 140 Fed. (2d) 550 at 552, 553.

King v. *Wall & Beaver Street Corp.*, 145 Fed. (2d) 377 at 380.

Koster v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518 at 519, 524; Note 2 at p. 522, Note 3 at p. 524.

79 Cong. Rec., p. 14528.

80 Cong. Rec., p. 5223.

The legal assumption to be made is that if Congress intended to depart from the well-established residence concept as controlling in venue cases, it would have said so in specific words.

United States v. *Madigan*, 300 U. S. 500, at 503, 506.

Proutt's Estate v. *Commissioner of Internal Revenue*, 125 Fed. (2d) 591, at 595.

IV.

The construction of Section 51 of the Judicial Code upon a citizenship concept leads to absurd results and should, therefore, be avoided.

Haggar Co. v. *Helvering*, 308 U. S. 389, at 394.

The Modern Corporation and Private Property (1932; The MacMillan Company) by A. A. Berle, Jr., pp. vii, 121, 277.

Harvard Business Review, Vol. XXVI, No. 2, March, 1948, pp. 213, 215.

Harvard Business Review, Vol. XXVII, Jan. 1949, p. 124.

As to the Eighth Cause of Action, since foreign service of process cannot validly be made upon indispensable corporations where the venue depends upon the residence of the shareholder, baffling results ensue from a construction of the statute based upon citizenship concepts.

Greenberg v. *Giannini*, 140 Fed. (2d) 550, at 552.

V.

The construction of Sections 1391(a), 1401, 1404(a) and 1406(a) of Title 28, U. S. Code, in line with a construction of Section 51 of the Judicial Code upon citizenship con-

cepts, leads to the strange result that had this action been instituted after September 1, 1948, the District Court in Delaware would have been required under Section 1406(a) to transfer it to the district of the residence of the plaintiff; and the district court in that district would have been precluded under Section 1404(a) from transferring it elsewhere notwithstanding what might be the merits as to forum non conveniens. This result is a mockery of the statements of this Court in *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, at 524-525, that the district of the residence of a shareholder is seldom an appropriate forum.

VI.

Section 1406(a) of Title 28, U. S. Code, is remedial and purely procedural in character, and was effective when the Court of Appeals for the Third Circuit rendered its decision and, in view of the determination made by the Court of Appeals for the Third Circuit that venue in the District of Delaware was improper as to respondents Johnson, Murphy and Herndon, the Third Circuit should have applied Section 1406(a) and remanded the case with instructions to transfer it to the district of the residence of the plaintiff.

A. Both Sections 1404(a) and 1406(a) of Title 28, U. S. Code, are remedial and purely procedural in characted; and the Court erred in holding that the statutory provisions of Section 1404(a) were applicable in the case at bar but that the provisions of Section 1406(a) were not.

B. The cases relied upon by the Court of Appeals merely decide that legislation enacted subsequent to a judgment of a lower court cannot affect rights which have vested thereunder.

McCullough v. *Virginia,* 172 U. S. 102 at 123.
State of Pennsylvania v. *The Wheeling & Belmont Bridge Co.,* 59 U. S. 421, at 431.
Hodges v. *Snyder,* 261 U. S. 600.

No one obtains any vested rights in venue.

Hayes v. *Chicago R. I. & P. R. Co.,* 79 Fed. Supp. 821, at 824.
Brotherhood of Locomotive Firemen and Enginemen v. *LeRoy Graham,* C. A. D. C., October 26, 1948, not reported (Rec. 229-239).

C. The dominant principle is that *nisi prius* and appellate tribunals must conform their orders to the law as it exists, whether in statutory form or in the form of judicial decision, at the respective times of their respective decisions, except as to rights which have vested.

Brotherhood of Locomotive Firemen and Enginemen v. *LeRoy Graham,* C. A. D. C., October 26, 1948, not reported (Rec. 229-239 at 239).
Dinsmore v. *Southern Express Co.,* 183 U. S. 115.
Carpenter v. *Wabash Railway Co.,* 309 U. S. 23, at 26.
Abraham v. *National Biscuit Co.,* 89 Fed. (2d) 266, at 268.
United States v. *Schooner Peggy,* 1 Cranch. 103, at 110.
Vandenbark v. *Owens-Illinois Glass Co.,* 311 U. S. 538, at 542.
Missouri ex rel. Wabash Railway Co. v. *Public Service Commission,* 278 U. S. 126, at 130.
Ziffrin, Inc. v. *United States,* 218 U. S. 73, at 78.
111 A. L. R., Annotation, pp. 1317-1348.

ARGUMENT.

I.

The requirements of Section 24 of the Judicial Code (Title 28, U. S. C. A., Sec. 41(1)) are fully met in the case at bar, as the plaintiff is a citizen of the State of Illinois and each of the defendants is a citizen of a State other than Illinois; and the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs.

The plaintiff, as a stockholder of respondent Mountain Producers, requested that corporation to take action to recover for the wrongs alleged in the complaint (Rec. 33). Mountain Producers refused to take the requested action (Rec. 33). It is well established that insofar as diversity of citizenship is concerned, the injured corporation joined as a party defendant will not be realigned as a party plaintiff.

> *Doctor* v. *Harrington*, 196 U. S. 579 at 587-588, 25 S. Ct. 355, 49 L. Ed. 606 (1904).
>
> *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518 at 522-523, 91 L. Ed. 1067; 67 S. Ct. 828 (1946).

Section 24 of the Judicial Code relates to citizenship. Section 51 of the Judicial Code (Title 28, U. S. C. A., Sec. 112) speaks in terms of residence. The concept of citizenship is entirely different from the concept of residence. A citizen is a member of a State, who owes allegiance to the State and is entitled to reciprocal protection from it. A resident is one who dwells in a place for a period of more or less duration.

It is interesting to note that in Title 28, U. S. Code,

recently enacted into law, Chapter 85, which treats of jurisdiction of district courts, makes no provision for any multiple citizenships. The same statute in Chapter 87, dealing with venue in the district court, specifically recognizes certain multiple residences of corporations. Section 1391 of Chapter 87, Subsection (c) (Title 28, U. S. Code) provides that for venue purposes as to suits against a corporation, the residence of the corporation shall be regarded as any one of the following judicial districts: where it is incorporated, where it is licensed to do business, or where it is doing business.

In *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165 (1939), Mr. Justice Frankfurter said at page 167:

> "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition * * *. Section 51 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' *Commercial Ins. Co.* v. *Stone Co.*, 278 U. S. 177, 179."
>
> *Camp* v. *Gress*, 250 U. S. 308 at 316 (1918).

The basic question is whether a defendant claiming personal privilege respective the venue is entitled under Section 51 of the Judicial Code as it read when this action was instituted to defeat the venue by the application of citizenship concepts to a statute which speaks of residence and relates to the convenience of litigants.

II.

Section 51, Subsection (a), of the Judicial Code originally read as follows:

> "Except as provided in Sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." (Title 28 U. S. C. A., Sec. 112, Historical Note p. 44.)

In 1911 this statute was amended by adding to the foregoing language the following:

> "But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (Historical Note, p. 44, *supra.*)

This amendment in 1911 clearly presupposes the existence of a jurisdiction founded upon diversity of citizenship. The venue never comes into play until and unless diversity of citizenship jurisdiction has first been established.

In 1936 this statute was again amended, this time by replacing the period at the end of the 1911 amendment by a semicolon and adding the following:

> "Except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found (Title 28, U. S. C. A., Cum. Pocket Part, 1947, Sec. 112, p. 19)."

It is clear from a reading of the entire statute that the 1936 amendment creates an exception to the general rule of the 1911 amendment.

The 1936 amendment to Section 51 of the Judicial Code originated as Senate Bill 2524 in the 74th Congress. This bill was introduced by Senator Tydings (79 Congressional Record, p. 11959). As introduced in and originally passed by the Senate the amendment read:

> "provided, that in cases where there is more than one defendant, *suit may be brought in any district where any of such defendants resides,* but the court shall, upon petition, transfer such suit to the district where the convenience of all the parties will be best subserved, and process in such cases may be served on any defendant who resides in any other district than the one in which such civil suit is brought by service in the district where such other defendant resides or may be found." (79 Congressional Record, p. 14528, 14529.) (Emphasis ours.)

The author of the Bill, although saying that he would rather have the Bill as amended than no Bill at all, successfully resisted an amendment thereto which would have added at the end of his language the following:

> "but this proviso shall only apply where all the parties joined as defendants are indispensable parties." (79 Congressional Record, p. 14110.)

After passing the Senate, the bill went to the House where the language was changed to that of the present statute; and was in due course reported back to the Senate. Senator Tydings made a motion that the Senate concur in the House amendments, saying when he did so:

> "Mr. President, this bill has passed the Senate and House. The House has adopted slight amendments clarifying the language but not changing the philosophy of the bill. I have taken the matter up with the chairman of the committee and I think

there will be no objection. I was the author of the bill." (80 Cong. Rec., p. 5223.)

Let us see what the author of the bill considered to be the philosophy thereof, which he says is not changed by the slight amendments of the House.

When debate first arose on Senate Bill 2524, Senator Tydings said:

> "Mr. President, this is one of the most important bills on the calendar * * *. It grew out of these circumstances: In the days of consolidations of companies, particularly utility companies, quite often the minority stockholders were in a position where, as they thought, they had been defrauded, and yet, when they filed suit, if they filed in the State court, they could not get the data because that was under another jurisdiction; and if they filed suit in the Federal court, they could not get the data because that was under another jurisdiction. So there was no forum where such minority stockholders could go and secure an accounting which they considered rightfully in their interest * * *."
>
> "If enacted, the bill would simply close a gap in the law so that a man who feels that he has been defrauded by another in the acquisition or sale of property may have his day in court and be entitled to have all the data presented there." (79 Cong. Rec., 11959.)

In subsequent debate, the author of the bill was asked by Senator Johnson:

> "Mr. President, is it a bill for the protection of the minority stockholders?"

and he answered:

> "It is." (79 Cong. Rec., p. 14110.)

The Court of Appeals in Footnote 5 of its opinion (Rec. 212) quotes from a statement made by Mr. Tydings in which he again describes the philosophy of the bill to be to the effect "that all the proceedings may be tried by

one court to ascertain whether or not the minority stockholders have been defrauded or not." (79 Cong. Rec., p. 14529.) This is the philosophy which the author of the bill states has not been changed by the slight amendments thereof made in the House. This is the philosophy that is well stated in the original language of the bill framed by its author, that in cases where there is more than one defendant, suit may be brought in any district where any defendant "*resides.*" All that the House amendments accomplished was to restrict the bringing of the suit to the district of the residence of the aggrieved corporation; that is to say, the House adopted the amendment which had previously been rejected by the Senate (p. 22, *supra*).

Certainly in the legislative history of this bill in the Senate where it originated there is nothing to show that it was the intention of that branch of Congress to import a jurisdictional element into this venue statute; and, on the contrary, the language of the author of the bill conclusively rebuts any such intention.

The entire purpose of the bill was not to make it more difficult for minority stockholders to obtain proper venue by requiring them to hurdle the jurisdictional fence twice, once in the actual suit and once in a suppositious suit; but, as Senator Tydings himself has said, to make venue requirements such "that all the proceedings may be tried by one court to ascertain whether or not the minority stockholders have been defrauded or not." (79 Cong. Rec., *supra.*)

The approach by a court to the task of construing a statute has been well stated by Mr. Justice Holmes in *Northern Securities Co.* v. *United States,* 193 U. S. 197, at 401 (1903):

> "What we have to do in this case is to find the meaning of some not very difficult words * * * while at times judges need for their work the training of

> economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt."

Judge Woolley of the Court of Appeals for the Third Circuit stated in *Rodenbaugh* v. *United States*, 25 Fed. (2d) 13 (1928) at page 15:

> "Before construing the statute in question we bring into view certain applicable, and helpful, canons of construction, the fundamental one being that courts should ascertain and give effect to the intention of the legislative body * * *. When, because of doubtful language, two possible intentions appear, another canon of construction requires that courts shall select the one which is rational and sensible * * * and which bears most directly on the object which the legislative body sought to obtain or the evil which it endeavored to remedy or avoid."

In *Haggar Company* v. *Helvering*, 308 U. S. 389, 60 S. Ct. 337, 84 L. Ed. 340 (1940), Mr. Justice Stone said at page 394:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."

We have shown the evil sought to be remedied by Congress; and contend that the double-diversity test is not consonant thereto.

Let us now see whether the Court of Appeals for the Third Circuit in construing the 1936 amendment to Section 51 of the Judicial Code has used the rational meaning of the words of the statute and has avoided the selection of interpretations which lead to absurd results.

III.

The 1936 amendment to Section 51 of the Judicial Code in broad terms provides that a stockholders' action may be brought in any district in which suit might have been brought by the aggrieved corporation. It is framed in the language of an exception to the statute as it theretofore read. It should be perfectly clear that this exception modifies only the clause immediately preceding the exception, namely the 1911 amendment, which has two elements: (1) in suits where jurisdiction exists because of diversity of citizenship, (2) such suits shall be brought only in the district of the "*residence*" of the plaintiff or the defendant. The 1911 amendment does not grant diversity jurisdiction; it assumes its existence under Section 24 of the Code. It predicates venue upon the residence concept, not the citizenship concept.

We find in the 1936 amendment a phrase, at its very inception, which clearly reverts back to the clause assuming the existence of diversity jurisdiction in the 1911 amendment. That phrase is as follows: "Except that suit by a stockholder on behalf of a corporation * * *."

By properly correlating the language of the 1911 amendment and that of the 1936 amendment, the language of the statute is:

> "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation. * * *"

Given this language, why the predication of venue in the 1911 amendment upon the residence concept and the predication of venue in the amendment thereto enacted in 1936

upon the citizenship concept? Where is the "clear and unambiguous" language of the statute to which the Court of Appeals has referred which calls for the double-diversity test?

In the recent case of *Saltzman* v. *Birrell,* 78 Fed. Supp. 778 (S. D. N. Y.; 1948), a citizen of New Jersey sued a New York corporation on its behalf, New York corporations subsidiary to it and residents of New York, all residents of the district. Nonresident defendants were also sued and moved to dismiss for improper venue. The District Judge denied the motion. Judge Rifkind found no clear and unambiguous language in the statute such as the Court of Appeals has said exists, but stated at page 784:

> "I read Section 51 as a venue statute. The clause under examination presupposes the existence of federal jurisdiction. Nothing in the statute suggests the need of double diversity. Such a construction would not execute the policy of the statute which is designed to facilitate the bringing of stockholder's suits. The words 'may be brought in any district' have a venue, rather than a jurisdictional connotation. The language is manifestly concerned with the choice of a district, a problem which does not arise until a jurisdictional basis already exists. When diversity is absent (in a case where that is the only ground of federal jurisdiction) the defect cannot be cured in any district. The Court of Appeals of this circuit has expressly stated that the statute was not directed to the substantive jurisdiction of the district court. 'But, not only was § 112 (28 U. S. C. A.) before the amendment concerned with venue alone, but so was the amendment itself; * * *.' *Greenberg* v. *Giannini,* 2 Cir., 1944, 140 F. (2d) 550, 553, 152 A. L. R. 966."

The Court of Appeals contends that because in the 1936 amendment Congress does not specifically say that suit may be instituted in the district where the injured corporation resides, that is to say, does not use words denoting resi-

dence, therefore, it is logical to assume that Congress is departing from the residence concept and adopting as its criterion an additional citizenship concept. Is it not more logical to assume that, Congress having used words relating to residence in the 1911 amendment might have considered it redundant to repeat such words in the 1936 amendment which modifies the 1911 amendment?

The legal assumption to make is that had Congress intended to depart from the then well-established residence concept as controlling in venue cases, it would have said so in specific words.

United States v. *Madigan*, 300 U. S. 500 at 503, 506; 57 S. Ct. 566, 81 L. Ed. 767 (1936).

Proutt's Estate v. *Commissioner of Internal Revenue*, 125 F. (2) 591 (C. C. A. 6, 1942), at 595, where we read:

"Had Congress intended to effectuate a change in the meaning of the section, it could easily have done so by express amendment. Amendment by implication should not be assumed, unless clearly indicated from the context."

Prior to the enactment of the 1936 amendment, Section 51 had provided that stockholders' suits which were founded upon diversity of citizenship could be brought "only in the *district* of the *residence* of either the plaintiff or the defendant." (Emphasis supplied.) It is obvious that the word "district" relates to the geographical area in which venue is to be laid.

The 1936 amendment provides that the suit "may be brought in any *district* in which suit against the defendant or defendants might have been brought by such corporation. * * *" (Emphasis ours.)

Insofar as venue is concerned, the corporation could bring suit at its residence or the residence of the defendant. The only geographical area, therefore, which

is added as a district of proper venue by the 1936 amendment is the district of the residence of the aggrieved corporation; and as to the injured corporation, that of the other defendants.

In *Greenberg* v. *Giannini*, 140 Fed. (2d) 550, C. C. A. 2 (1944), Judge Hand said at page 552:

> "Before the amendment * * * the shareholder could sue in any district in which either he or the offending directors resided. * * * It might happen, however, that the injured corporation could not be served in that district, and since, as will appear, it is always an indispensable party, the shareholder's hands were often effectively tied; there was no district where he could sue. It was to meet this difficulty that he was given the privilege of suing * * * in any *district* where the corporation could have sued them. That meant the *district* where the corporation or the directors '*resided*' * * * in practice it added only the district where the corporation '*resided*'." (Emphasis supplied.)

In *King* v. *Wall and Beaver Street Corp.*, 145 Fed. (2d) 377, C. A. D. C. (1944), we read at page 380:

> "Clearly, in the 1936 amendment, all that Congress was seeking to accomplish was to establish a third jurisdiction in which suits like this could be brought, this is to say, in addition to the district of the defendant, *also the district of the corporation.*" (Emphasis supplied.)

It is inconceivable that Congress intended in cases where some of the wrongdoers were residents of the district of the aggrieved corporation and, therefore, amenable to venue under the 1911 amendment, and some nonresidents of that district, that such nonresidents, by the fortuity that they joined wrongdoing hands with residents of the district, were to be given immunity from suit in the district of the aggrieved corporation. Such a construction certainly does not meet the philosophy of the author of the bill that

where stockholders have been defrauded, venue requirements should be established so that all the proceedings may be tried by one court.

In the 1911 amendment, Congress speaks of the district of the residence of either the plaintiff or the defendant. In the language of the 1936 amendment, Congress twice uses the word "district." It provides first that the stockholders' action may be brought in any "district" in which suit against the defendant or defendants in the action might have been brought by the injured corporation, and secondly, that process in such cases may be served upon the aggrieved corporation in any "district" wherein the corporation *resides* or may be found. Congress has enacted a statutory definition of the word "district" (Sections 69, 75 of the Judicial Code; Title 28 U. S. C. A., Sec. 141, 148); as to the District of Delaware, it is the State of Delaware, a geographical area.

Congress has also defined "district court" (Section 1 of the Judicial Code; Title 28 U. S. C. A., Sec. 1), which is the Federal Court in the given geographical area.

In Section 51 of the Judicial Code, Congress also uses the words "district court." Analyzing the language of this statute, we find Congress providing: (1) that in a civil action actually instituted in a *district court*, no person shall be arrested in one *district*, a geographical area, for trial in another; (2) that no civil suit shall be brought in a *district court* against any person by any original process or proceeding in any other *district*, a geographical area, than that whereof he is an inhabitant; (3) as an exception to the foregoing provisions, Congress has provided that where it has been established that jurisdiction is founded upon diversity of citizenship, suit shall be brought only in the *district*, a geographical area, of the *residence* of either the plaintiff or the defendant; (4) and as an exception to the last provision, that a stockholders' suit

may be brought in any *district,* a geographical area, in which suit against the defendant or defendants in said stockholders' action other than said corporation might have been brought by such corporation and that process in such cases may be served upon the injured corporation in any *district,* a geographical area, wherein the corporation *resides* or may be found.

In order to reach the conclusion of the Court of Appeals, it is necessary to tamper with the words actually used by Congress, in three ways: (1) by substituting the words "district court" for the word "district"; (2) by inserting language specifically referring to the jurisdiction of the district court; and (3) by causing the words "defendant or defendants" to read "all of the defendants served with process."

The language of the statute would then read:

> "Except that suit by a stockholder on behalf of a corporation may be brought in any district court which would have jurisdiction of a suit against all the defendants served with process in said stockholders' action, which might have been brought by such corporation * * *."

In a suit against all of the defendants by the injured corporation in the Federal Court for the District of Delaware, venue would properly lie under the 1911 amendment, this being the district of the aggrieved corporation who would be the plaintiff in such a suit. It is diversity jurisdiction which fails in such a suit as to the corporate defendants Saltmount, Argo and Stanolind who are citizens of the District of Delaware. Both diversity jurisdiction and venue would be proper in such a suit as against the respondents Johnson, Murphy and Herndon.

As to the double-diversity test, the recent decision of this Court in *Koster* v. *Lumbermens Mutual Casualty Co., supra,* has significance. While the *Koster* suit was pending, a stockholders' action had been instituted on behalf

of and against the same Illinois corporation and individual citizens of Illinois (*Koster* case, *supra,* pp. 519, 524). In Note 2 at page 522 of the decision in the *Koster* case, *supra,* this Court discusses the application of Section 51 of the Judicial Code; and in Note 3 at page 524 clearly indicates that this statute is no bar to the Illinois action in which the aggrieved corporation was a citizen of Illionis and the alleged wrongdoing defendants were citizens of Illinois.

The opinion of the Court of Appeals has as a necessary foundation an insistence that in the suppositious suit against the corporation, the venue test established by the 1936 amendment relates to *all* of the defendants in the actual suit, not merely to the defendants, against whom venue depends upon the amendment to Section 51 of the Judicial Code enacted in 1936 and who raise the question of improper venue. If one construes the words "defendant *or* defendants" in the amendment to relate only to those defendants against whom venue depends upon the 1936 amendment to the statute and who assert their personal privilege as to venue, the position of respondents Johnson, Herndon and Murphy is not one whit affected by the fact that in the actual suit there are other corporate defendants joined with them. Respondent Mountain Producers, being a Delaware corporation, both as to venue and diversity jurisdiction, could have sued the respondents Johnson, Murphy and Herndon in the District Court of the United States in the District of Delaware, these respondents being variously residents of Colorado and Texas.

The fallacy of thought of the Court of Appeals is the more significant when one looks at the language of the Bill originally submitted by Senator Tydings that "in cases where there is more than one defendant, suit may be brought in any district where *any of such* defendants *re-*

sides. * * *'' (79 Cong. Rec. 14528). (Emphasis supplied.) As to amendments of this language in the House Bill, it is to be recalled that Senator Tydings referred to these amendments as ''slight amendments clarifying the language but not changing the philosophy of the bill.'' (80 Cong. Rec. 5223.) The language in the Senate Bill refers to residence, not to citizenship. It provides for venue in the district where any of the defendants reside. There is certainly no clarification of this language, but in fact a violent disturbance and alteration of it, by the double-diversity test used in the construction of the statute by the Court of Appeals.

IV.

We come now to the avoidance of absurd results in the construction and interpretation of Section 51 of the Judicial Code. The avoidance of such results is particularly important in stockholders' actions because of the paramount public interest therein involved. Both legislators and the courts have been prone to disregard this public interest and to consider such litigation as a mere struggle by private parties over property rights and fiduciary obligations.

Modern corporations such as respondent Mountain Producers have nothing in common with the pioneer corporation as to which corporate law built up a body of precedents, except the corporate form. The stock of Mountain Producers is traded upon the New York Curb Exchange and, except for the sizable block thereof held by Standard Indiana, is widely held by thousands of stockholders in many States (Rec. 33). Its officers and directors own but a small fraction of its stock (Rec. 138, 139). Such corporations have been aptly called ''quasi public corporations'' by A. A. Berle, Jr., who with the collaboration of economist Gardiner C. Means in 1932 published *The Modern Corporation and Private Property* (The MacMillan

Company). In the Preface to this book at page vii, Mr. Berle writes:

> "It is of the essence of revolutions of the more silent sort that they are not recognized until they are far advanced. This was the case with the so-called 'industrial revolution,' and is the case with the corporate revolution through which we are at present passing.
>
> "The translation of perhaps two-thirds of the industrial wealth of the country from individual ownership to ownership by the large, publicly financed corporations vitally changes the lives of property owners, the lives of workers, and the methods of property tenure. The divorce of ownership from control consequent on that process almost necessarily involves a new form of economic organization of society."

In the text at page 121, the writer goes on to say:

> "When the owner was in control of his enterprise, he could operate it in his own interest and the philosophy surrounding the institution of private property has assumed that he would do so. This assumption has been carried over to present conditions and it is still expected that enterprise will be operated in the interests of the owners. But have we any justification for assuming that those in control of a modern corporation will also choose to operate it in the interests of the owners? The answer to this question will depend on the degree to which the self-interest of those in control may run parallel to the interests of ownership and, insofar as they differ, on the checks on the use of power which may be established by political, economic, or social conditions."

As to the position of the stockholder in the modern corporation, the author further writes at page 277:

> "It follows from all of the foregoing that the shareholder in the modern corporate situation has surrendered a set of definite rights for a set of indefinite expectations. • • •

> "The stockholder is therefore left as a matter of law with little more than the loose expectation that a group of men, under a nominal duty to run the enterprise for his benefit and that of others like him, will actually observe this obligation."

There is a public interest in the integrity of the management group in the modern corporation which far outweighs the private interests of both the stockholders and the managers. This has been well stated in an article in the *Harvard Business Review,* Volume XXVI, No. 2, March, 1948, by John W. Welcker, Associate Professor of Business Administration, who writes in an article entitled "Fair Profit?" at page 213:

> "When companies grow large in size and their operations become highly complicated, individual stockholders can exercise little effective control over management. There is strong support for the view that large corporations today are really institutions and the board of directors are really self-perpetuating groups. * * *"

This author concludes at page 215:

> "One of the most serious problems confronting American business today is to secure adequate equity capital. This risk money is essential if we are to retain private enterprise in America. * * * Prudent financiers may well question whether public confidence can be retained if a few insiders continue to take huge profits while taking relatively little risk or in some cases no risk at all. * * * Let it be repeated: Business men who take such enormous short-run profits jeopardize the long term interests of *all* business by destroying public confidence in business leadership."

The perpetuation of our profit-incentive system depends upon the successful operation of our modern corporations not merely in balance-sheet figures, but, and moreover, in terms of human attitudes toward labor, government and the investor group. There is an interrelationship between

these attitudes—a weakness in any one of them necessarily affects the others. Management groups who despoil, destroy the confidence of labor, the fruit of whose tree is the investment dollar; and open inroads for attack upon a government which supports their existence.

Mr. Harry A. Bullis, chairman of the board of General Mills, Inc., has well said:

> "management acts as a balance wheel for the interests of employees, stockholders, and the consuming public. It is in a position of trusteeship for all of these groups." (*Harvard Business Review,* Vol. XXVII, Jan. 1949, p. 124.)

Management groups who mulct the stockholders display a philosophy of religion in which all loyalties gravitate to themselves; and are of the same ilk as those who resist necessary governmental regulation of their powers and who cause strife and dissension with labor by antagonism to fair wages, security to employees, reasonable service to the public and stabilization of business.

It is thus in the public interest that the courts should avoid consequences which act as a grotesque shield to management groups called to account in stockholders' actions. The important feature of such suits is not the dollar and cents recovery; it is the determination of the ambit and extent of the duties and powers of management in the light of the human desire of labor, investors and the general public that our profit-incentive economic system shall live and thrive.

The first absurd result of the construction and interpretation of Section 51 of the Judicial Code by both the District Court and the Court of Appeals is that as to all of the causes of action except the Eighth Cause of Action in which there are two indispensable parties defendant both citizens of and resident in Delaware, had the plaintiff filed one suit in the District Court for the District of Delaware

against the corporate defendants involved in such causes of action, venue would properly lie because under the 1911 amendment all of those defendants are residents of Delaware; and if the plaintiff had filed another suit in the same court against the aggrieved corporation and the respondents Johnson, Herndon and Murphy, venue would properly lie under the 1936 amendment because the aggrieved corporation, respondent Mountain Producers, could have sued these defendants in the same court, Mountain Producers being a citizen of Delaware and the respondents Johnson, Herndon and Murphy variously citizens of Colorado and Texas. It seems perfectly ridiculous that propriety of venue should hang upon such a slender thread, namely that had the plaintiff instituted two suits instead of one, venue would have been proper in both of them in the same court in which the plaintiff filed his one action. The Court of Appeals places its stamp of approval upon such a result saying:

> "We conclude that Section 51, as amended by the Act of 1936 * * * authorized suit to be brought * * * (b) in a district in the State, if any, in which all the defendants including the injured corporation resided, and also, if there was diversity of citizenship between the injured corporation and all the other defendants." * * * (Rec. 214.)

We come now to the Eighth Cause of Action. This is a double-derivative action. The Eighth Cause of Action relates to wrongdoing against defendant Saltmount in which respondent Mountain Producers has a fifty per cent ownership interest (Rec. 91-96). The direct wrong is to defendant Saltmount, which is, therefore, an indispensable party. In this Cause of Action there are two indispensable parties, respondent Mountain Producers and defendant Saltmount. The principal wrongdoers are respondents Johnson and Herndon, one a citizen and resident of Colorado and one a citizen and resident of Texas. It is im-

portant that they be joined in one proceeding in one court with Mountain Producers and Saltmount for a determination of the merits of the alleged fraud. Let us say that the suit is started in the Federal Court in Colorado and that respondent Herndon is served in Colorado. Respondent Herndon resides in Texas. Venue would only be good as to him under the 1936 amendment of Section 51. If the Court of Appeals is correct, Colorado would not have proper venue because Saltmount and Mountain Producers are both citizens of Delaware, and under the double-diversity test the action fails as to Herndon.

If suit be filed in the Federal Court in Texas, the same applies to respondent Johnson who is a citizen and resident of Colorado and who has been joined in the same action with two corporations citizens of Delaware.

It is a ludicrous result which leaves the corporate defendants Saltmount and Mountain Producers before the District Court in Delaware and dismisses the individual wrongdoers. Such a result accomplishes the very thing which Senator Tydings, author of the bill, attempted to avoid, namely to have no one federal district in which all of such wrongdoers can be brought to task in one proceeding.

It has been decided in *Greenberg* v. *Giannini, supra,* at page 552 (See note, *Koster* v. *Lumbermens Mutual Casualty Co., supra,* p. 523) that foreign process of service cannot validly be made upon indispensable corporations in a case in which the venue depends upon the residence of the shareholder, with the result that even if process could be had against the respondents Johnson, Murphy and Herndon in Illinois, suit would fail as to an indispensable party. Respondent Mountain Producers does not do business in Illinois (Rec. 154).

Once we accept the construction of the 1936 amendment to Section 51 of the Judicial Code as determined by the

Court of Appeals for the Third Circuit, we thus reach the baffling result that as to this cause of action, Congress intended to legislate that as to the corporate defendants Mountain Producers, Saltmount and Argo, citizens of Delaware, suit may be brought in the District Court for the District of Delaware where, as to these defendants, it is now lodged under the judgment of the Court of Appeals; but that as to the respondents Johnson and Murphy, the cause of action must be pursued in the District Court for the District of Colorado; and as to the respondent Herndon, it must be pursued in the District Court for the applicable division of the District of Texas. Even if the action in Delaware be dismissed, it would still be necessary for the plaintiff to pursue two actions, one in Colorado and one in Texas; and as to Section 1404(a), we shall presently demonstrate that under the construction of the Court of Appeals for the Third Circuit, a motion to transfer either one of these two actions, one in Colorado and one in Texas, either to Texas or Colorado, because of forum non conveniens, would fail whatever the merits of the motion might be.

It is a strange construction that interprets a statute whose philosophy is the trial of all proceedings by one court to ascertain whether or not minority stockholders have been defrauded, so as to substitute two courts for the one court in which the action was instituted.

V.

During the pendency of the appeal, Revised Title 28, U. S. Code, became effective on September 1, 1948. As to venue in stockholders' derivative actions, Section 1401 provides:

> "Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district

where the corporation might have sued the same defendants."

Section 1391(a) provides:

> "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

The permissive *may* is used in both of these statutory enactments; thus, at this time, a stockholders' suit may be instituted where all the plaintiffs reside, where all the defendants reside, or where the aggrieved corporation might have sued all of the defendants. If, as to Section 1401, the decision of the Court of Appeals for the Third Circuit relating to the 1936 amendment to Section 51 is controlling, then, other than at the place of the residence of all the plaintiffs or all of the defendants, the stockholders' suit may be instituted only in the district of the residence of the aggrieved corporation if all or none of the other defendants are *citizens* of the same district as that of the aggrieved corporation.

Section 1406(a) of Revised Title 28, now in force and effect, provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division *in which it could have been brought.*" (Emphasis supplied.)

Let us assume that the action against the corporate defendants Mountain Producers, Saltmount, Argo and Stanolind and against the respondents Johnson, Murphy and Herndon had been instituted after September 1, 1948; and service of process had been obtained on all of those defendants. Under the construction of the 1936 amendment to Section 51 of the Judicial Code applied to the language of Section 1401 of Revised Title 28, venue would

improperly lie in the District of Delaware. The District Court in Delaware would, therefore, be required under Section 1406(a) to transfer the case to another district "in which it could have been brought."

Once the double-diversity test is applied, the only district in which the action against all the defendants could possibly have been brought is the district of the residence of the plaintiff. But, to transfer the case to the district of the residence of the plaintiff may possibly be a mockery of the decision of this Court in *Koster* v. *Lumbermens Mutual Casualty Co., supra,* where this Court directs attention at pages 524 and 525 of its decision to the fact that the district of the residence of the plaintiff is seldom an appropriate forum.

We may well envisage this procedure: a transfer from the District Court in Delaware to the District Court in Illnois; and once the case is there transferred, a motion to transfer from the District Court of Illinois under the provisions of Section 1404(a) of Revised Title 28, U. S. Code, referring to forum non conveniens, in the language of the statute, "to any other district or division where it might have been brought."

A construction of either or both Sections 1401 and 1404(a) embodying the double-diversity test, leads to the strange result that the action could not possibly have been brought in any other district than that of the residence of the plaintiff; so that such a construction must lead to a denial of relief under Section 1404(a) whatever the merits might be, because the action is in the only "district or division where it might have been brought."

It is only by adhering to residence concepts and avoiding the pitfalls of the double-diversity test that the provisions of Section 1401, 1404(a) and 1406(a) lead to sensible results, particularly now that Section 1391(c) provides for multiple residences of corporations.

In any event, if the application of the double-diversity test is proper, then under Section 1406(a), as we shall hereafter demonstrate, the Court of Appeals for the Third Circuit should have remanded the case to the district court with instructions to transfer it to the District Court for the Northern District of Illinois, Eastern Division, in which district and division the plaintiff resides.

VI.

The Court of Appeals in its opinion calls attention to Section 1404(a) of Revised Title 28 which became effective during the pendency of the appeal (Rec. 217). As to this statutory enactment which pertains to forum non conveniens (an issue before the Court of Appeals but not before this Court), Judge Maris says that it is remedial and purely procedural in character and as such is to be applied to actions pending when it took effect unless Congress expressly provided to the contrary (Rec. 217). Because the District Court had neither granted nor denied relief on the ground of forum non conveniens, the Court of Appeals held that the statutory provisions relating thereto were applicable in the case at bar.

When, however, it was urged that the provisions of Section 1406(a) of Title 28, which had similarly been enacted during the pendency of the appeal, were applicable, the Court of Appeals held that because the District Judge had dismissed the complaint as to respondents Johnson, Murphy and Herndon, the application of the provisions of Section 1406(a) would involve the retroactive annulment of a valid judgment which the statute did not and could not do (Rec. 215). The Court of Appeals relied for authority upon three cases, *McCullough* v. *Virginia*, 172 U. S. 102 (1898); *State of Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 59 U. S. 421 (1855); and *Hodges* v. *Snyder*, 261 U. S. 600 (1922) (Rec. 215).

Certainly if, as the Court of Appeals has said, Section 1404(a) of Revised Title 28 is remedial and purely procedural in character (Rec. 217), then so also is Section 1406(a) which provides that if venue is improper the District Court shall transfer the case to any district or division in which it *could* have been brought (p. 9, *supra*).

None of the cases relied upon by the Court of Appeals involve judgments predicated solely upon procedural statutes. In *McCullough* v. *Virginia, supra,* a taxpayer had filed a petition to establish the genuineness of certain coupons on bonds of the State of Virginia which he had tendered in the payment of taxes. The taxpayer had fully complied with the terms of the Act of 1882 of the state legislature which required him first to pay the taxes and then to bring a suit to establish the genuineness of the coupons, which, if decided in his favor, would enable him to secure return of the money paid to the State. Upon trial, judgment was rendered in favor of the taxpayer by the lower court. There was a reversal in the Supreme Court of Appeals in the State of Virginia, and the matter came to the Supreme Court on writ of error.

In this Court it was urged that an Act of the Legislature of the State of Virginia enacted during the pendency of the appellate procedure repealed the previous statute authorizing the form of suit which had been brought by the taxpayer and that, since no State can be sued without its consent, the whole proceeding abates and the suit must be dismissed. Here the taxpayer had by the judgment of the lower court obtained a vested right to receive certain moneys from the State of Virginia. As to the contention that the subsequent statute disturbed this *vested right*, Mr. Justice Brewer says at page 123 of the decision in *McCullough* v. *Virginia, supra*:

> "At the time the judgment was rendered in the Circuit Court of the city of Norfolk the act of 1882 was in force and the judgment was rightfully entered

> under the authority of that act. * * * If rightful the plaintiff therein had a vested right which no state legislation could disturb. * * *"

In the second case relied upon by the Court of Appeals, *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co., supra,* there had been a prior decree of this Court which had declared a certain bridge to be an obstruction of free navigation of a river and which directed the removal of the obstruction either by elevating the bridge or by abatement. Subsequent to the entry of this decree, an Act of Congress was passed declaring the bridge to be a lawful structure in its present position and elevation and a post road. In the earlier decree of this Court, costs to which the plaintiff by that decree had a vested right had been adjudged against the defendant. This Court gave effect to the subsequent Congressional legislation excepting as to the vested right of the plaintiff to costs, Mr. Justice Nelson saying at page 431 of the decision of this Court:

> "The decree before us, so far as it respect the costs adjudged, * * * is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, * * * If, in the meantime (p. 432) since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced."

This is a stronger case than the case at bar which involves a purely procedural ruling. The plaintiff by decree had a substantive right to have a structure removed and yet, because of the intervening legislation and the fact that the substantive right was executory, the substantive right was declared unenforceable.

The third case upon which the Court of Appeals relies is similar to the second. In *Hodges* v. *Snyder, supra,* there was error to review a judgment of the Supreme Court of

South Dakota reversing, except as to costs, a decree of the state circuit court. The state circuit court, in accordance with an original decision of the Supreme Court of South Dakota, had entered judgment adjudging the invalidity of a consolidated school district and permanently enjoining the defendants from conducting the same, and awarding costs to the plaintiffs. The legislature then passed a curative act; after the curative act went into effect, a motion was made to set aside the injunction, and, upon a second appeal, the Supreme Court of South Dakota reversed that part of the judgment granting the permanent injunction but not that part awarding costs. This Court adhered to its decision in *State of Pennsylvania* v. *Wheeling & Belmont Bridge Co., supra.* In each of these cases, the public interest was at play.

There is a uniformity in these three decisions of this Court. It lies in the rationale that legislation enacted subsequent to a judgment of a lower court cannot affect rights which have vested thereunder. With this rationale we have no quarrel.

It does not follow therefrom, however, that a judgment of a district court which determines procedural rights as to venue and such procedural rights only and does not even award costs (Rec. 21), has acted to vest any rights in anyone. In *Hayes* v. *Chicago R. I. & P. R. Co.*, U. S. D. C., Minn., 79 Fed. Supp. 821, September, 1948, a district court had before it a motion to dismiss because of forum non conveniens which involved questions relating to the venue. As to this Judge Nordbye well said at page 824:

> "No one obtains any vested right in venue. It is granted by legislative enactment and can be withdrawn by the same power. The right is procedural and not substantive. The fact that these cases were brought in this District before the statute became effective is immaterial."

At the same time that this question was before the Court of Appeals for the Third Circuit, it was also before the Court of Appeals for the District of Columbia Circuit which on October 26, 1948, entered judgment diametrically opposite, as to the application of Section 1406(a), to that of the Court of Appeals in the instant case (Rec. 239). In *Brotherhood of Locomotive Firemen and Enginemen* v. *LeRoy Graham, et al.* (Rec. 229-239), the District Court for the District of Columbia had determined that venue was proper and denied a motion to dismiss for improper venue. Upon appeal, the Court of Appeals determined that the District Court had erred and that venue was improper. During the pendency of the appeal, Section 1406(a) had become effective and as to this the Court of Appeals for the District of Columbia Circuit said (Rec. 239):

> "Except where vested interests have intervened an appellate court must decide a case according to the law as it exists, whether in statutory form or in the form of judicial decision, at the time of its decision rather than according to the law as it existed at the time of the decision below. *Ruppert* v. *Ruppert*, 77 U. S. App. D. C. 65, 134 F. (2d) 497 (1942)."

It would be a specious and tenuous line of thought which would determine the applicability of Section 1406(a), a remedial statute relating to procedural matters, by the happenstance of whether a district court under previously existing law had made one or another determination as to the propriety of venue. The mere fact that in *Brotherhood of Locomotive Firemen and Enginemen* v. *Graham, supra*, the district court had not entered judgment dismissing the complaint for alleged improper venue, whereas in the case at bar the district court had so entered judgment, should not be the determinant of the applicability of Section 1406(a). The proper determinant is that stated by Judge Stephens of the Court of Appeals for the District of Columbia Circuit, namely that where no vested

interests have intervened, an appellate court must decide a case according to the law as it exists, whether in statutory form or in the form of judicial decision, at the time of its decision and not that of the lower court.

Judge Maris, who wrote the opinion of the Court of Appeals in this case (Rec. 207), so decided as to a change of law which was in the form of judicial decision. In *Abraham* v. *National Biscuit Co.*, 89 Fed. (2d) 266 (C. C. A. 3; 1937), at the time of the judgment of the district court for the defendants, there had been a decision of the Court of Appeals for the Third Circuit construing the Scire Facias Act of the State of Pennsylvania, which was followed by the district court in a jury instruction. During the appeal, the Supreme Court of Pennsylvania construed the same Act in opposite fashion to the prior construction thereof by the Third Circuit. The instruction was held to be erroneous and the case remanded for a new trial, Judge Maris saying at page 268:

> "The question remains, however, whether the construction of the Scire Facias Act which has now been made by the Pennsylvania Supreme Court shall be applied in this case although the trial took place before the decision in *Majewski* v. *Lempka, supra,* was announced. After full consideration of this question, we have come to the conclusion that this latest interpretation of the statute must be so applied. We are supported in this conclusion by the opinion of the Supreme Court of the United States in *Bauserman* v. *Blunt,* 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316. That case involved the interpretation of a statute of limitation of the state of Kansas. The circuit court at the trial interpreted the statute in accordance with the prior existing decisions of the Supreme Court of the state. After the circuit court's decision was made, and during the pendency of the appeal which was taken to the Supreme Court of the United States, the Supreme Court of Kansas * * * handed down a decision in effect modifying its prior decisions interpreting

> the statute of limitations. Its decision, if applied to the facts involved in the federal case, compelled a reversal of the circuit court. The Supreme Court of the United States held in that case that the latest interpretation by the highest court of Kansas of its statute of limitations was binding upon the federal courts. * * *"
>
> "Since the statute is merely procedural, it follows that the parties to this case can have acquired no rights under the prior construction of it."

It is difficult to perceive how Judge Maris can possibly square this decision with his decision in the instant case. In *Abraham* v. *National Biscuit Co., supra,* there had been a judgment dismissing the defendants from liability, after trial upon the merits. If respondents Johnson, Murphy and Herndon have any vested rights in the judgment of the district court dismissing the complaint as to them because of improper venue, surely the defendants in the *Abraham* case, *supra,* who had been dismissed from liability as the result of an instruction given in the course of trial, had vested rights which should not have been disturbed.

That the decision in the *Brotherhood of Locomotive Firemen and Enginemen, supra,* correctly states the law is fully sustained by the decisions of this Court. In *United States* v. *Schooner Peggy,* 1 Cranch. 103, 2 L. Ed. 49, the court had before it the question of an intervening treaty in an admiralty matter, as to which it said at page 110:

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligations denied. * * *"

In *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538 (1940) after the action of the trial court in dismissing a

suit for injury because of occupational disease, the State Supreme Court reversed its former decisions and declared that occupational diseases such as that complained of, were compensable under the common law. The Court of Appeals for the Sixth Circuit affirmed the dismissal, and certiorari was granted. This Court reversed, saying at page 542:

> "While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees. It has vacated judgments of state courts because of contrary intervening decisions, and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it * * * (p. 543). These instances indicate that the dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."
>
> *Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission*, 278 U. S. 126 at 130.

In *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 87 L. Ed. 621, there was an appeal to this Court from a decree of the district court denying a petition to set aside and annul an order of the Interstate Commerce Commission. There had been a change of statutory law pending the administrative hearing. This Court says at page 78:

> "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law."
>
> 111 A. L. R., annotation, pp. 1317-1348.

It is submitted that if the dominant principle is that *nisi prius* and appellate tribunals should conform their orders to the state law as at the time of entry of their respective judgments, and if administrative bodies must do likewise as to changes in the federal law, *nisi prius* and

appellate tribunals alike should conform their orders to the federal statutory law as of the time of the entry of their respective judgments, excepting only where rights have vested. It has been so held by this Court. In *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115 (1901) suit had been brought for relief as to the War Revenue Act of 1898. During appeal before this Court the War Revenue Act was amended by Congress in 1901 so as to exclude express companies from its operation. This Court decided that because of the amendment, the plaintiffs needed no relief.

In *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23 (1939), when the matter reached this Court, Subsection (n) of § 77 of the Bankruptcy Act gave priority to personal injury claims of employees of railroad corporations in bankruptcy. After petition for certiorari was filed, the law was amended to give such priority as to railroads in equity receiverships (p. 26). The defendant was in equity receivership and the lower courts had denied priority to petitioner who had a personal injury claim. This Court said at page 26:

> "For the present purpose, we may assume, without deciding, that the determination of the court below was (p. 27) correct * * * in the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable."

Conclusion.

By all of the criteria for construction and interpretation of statutes, the matter of legislative history, that of the natural and rational meaning of the words of the statute, and finally, the avoidance of absurd results, the double-diversity test established by the judgment of the Court of Appeals for the Third Circuit should be rejected.

If it is not, the provisions of Section 1406(a) of Title 28, U. S. Code, enacted into law during the pendency of the appeal, should have been given force and effect by the Court of Appeals and the case ordered remanded for transfer to the district of the residence of the plaintiff.

For the reasons assigned, Edgar J. Schoen respectfully petitions this Court to grant a writ of certiorari in this case.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1948.

No. 543.

EDGAR J. SCHOEN,

Petitioner,

v.

MOUNTAIN PRODUCERS CORPORATION, a Delaware Corporation, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENTS, ARTHUR E. JOHNSON, D. R. MURPHY AND HAROLD D. HERNDON, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 170 F. (2d) 707. The opinion of the United States District Court for the District of Delaware is reported in 76 Fed. Supp. 554.

JURISDICTION.

Jurisdiction of this Court is invoked under Revised Title 28 U. S. C. Sec. 1254 (1). The judgment of the Circuit Court of Appeals was entered November 9, 1948, and an order staying the mandate pending petitioner's application for a writ of certiorari was entered January 7, 1949.

STATEMENT OF THE CASE.

Petitioner, Edgar J. Schoen, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in so far as it affirms the District Court's dismissal of the complaint as to respondents, Arthur E. Johnson, D. R. Murphy and Harold D. Herndon.

On May 26, 1947, Schoen, a stockholder of Mountain Producers Corporation (a Delaware corporation), brought this derivative suit on behalf of Mountain Producers in the United States District Court for the District of Delaware, naming as defendants, Mountain Producers Corporation, Standard Oil Company (Indiana), Stanolind Oil & Gas Company, Saltmount Oil Company, Argo Oil Corporation, G. E. Griffith, W. J. Geddes, T. A. Dines, D. R. Murphy, Arthur E. Johnson, T. C. Tonkin and Harold D. Herndon (R. 8-13).

Jurisdiction in the District Court is based solely upon diversity of citizenship (R. 24). The plaintiff, Schoen, is a resident and citizen of Illinois (R. 8).

Defendants, Mountain Producers, Stanolind, Saltmount and Argo are all Delaware corporations and were served with process in Delaware (R. 3 and 8).

Defendants, Johnson and Murphy, citizens and residents of Colorado, and Herndon, a citizen and resident of Texas, were also served in Delaware (R. 3 and 8).

The remaining named defendants (Standard, Griffith, Geddes, Dines and Tonkin), are all residents and citizens of States other than Delaware. They were not served with process and have not appeared in this cause (R. 3 and 8).

On March 6, 1948 the District Court entered a judgment dismissing the complaint as to all the defendants on the ground that venue was improperly laid (R. 18-21) 76 Fed Supp. 554. On appeal, the Circuit Court of Appeals, likewise finding that venue was improper as to Johnson, Murphy and Herndon, affirmed the dismissal of the complaint as to them but reversed that part of the judgment of the District Court which dismissed the complaint as to the Delaware corporations (R. 207-219). 170 F. (2d) 707.

ARGUMENT.

I.

The Circuit Court of Appeals Correctly Decided That Venue Was Improper as to Respondents, Johnson, Murphy and Herndon.

Despite petitioner's elaborate and confusing representations to the contrary, the question presented is simple: Was the District of Delaware an appropriate district in which to bring this stockholder's derivative suit in view of the venue statutes in force prior to September 1, 1948?

At the time this suit was commenced (May 26, 1947), and at the time judgment was rendered in the District Court (March 8, 1948), whether or not venue was proper necessarily had to be determined by the applicable Federal venue statute then in force. That statute was Section 51 of the Judicial Code of 1911, as amended by Act of April 16, 1936, 49 Stat. 1213, which read as follows:[1]

> "Except as provided in sections 113-117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113-118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; *except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been*

[1] Prior to 1936 the general venue statute consisted of the non-italicized language. The italicized portion represents the 1936 amendment.

brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." (Italics supplied.)

A. The Language of Former Section 51 of the Judicial Code Is Not Susceptible of the Meaning Petitioner Seeks to Place Thereon.

The court below found the language of the statute clear and unambiguous (R. 210). The non-italicized provisions permitted diversity suits to be brought either in the district where the plaintiff resided or in the district where the defendant resided and in those instances where there were more than one defendant, the latter meant the district in which all the defendants resided. *Camp v. Gress,* 250 U. S. 308 (1919). Obviously, the non-italicized provisions did not, as to Johnson, Murphy or Herndon, support the venue laid in the present case, for the District of Delaware was neither the district where plaintiff resided (Illinois), nor where the defendants, Johnson, Murphy (Colorado), and Herndon (Texas) resided.

The above quoted italicized provisions stated, in effect, that a stockholder could bring a derivative suit on behalf of an injured corporation in any district in which suit against the other defendants "might have been brought by said corporation". This language simply provided a rule for testing venue in derivative suits and, applied to this case, meant that unless Mountain Producers (a Delaware corporation) could maintain in the Federal District Court of Delaware a suit against Johnson, Murphy and Herndon (citizens and residents of Colorado and Texas) and other Delaware Corporations (Argo, Saltmount and Stanolind), venue was improper. That venue was improper under such circumstances is clear. Such a suit could not have been maintained because of the absence of complete diversity between plaintiff and all the defendants. As Judge Maris stated (R. 210-211):

"Whether a corporation may bring a suit in a given district certainly depends just as much upon whether the district court of that district would have jurisdiction of the subject matter as upon whether the district is one in which the venue statute authorizes suit to be brought. If no federal district court in any district would be empowered to entertain the suit, it is idle to talk of a particular district in which suit might be brought. Moreover, under the statutory language, we are compelled in any event to consider the question of jurisdiction before we can ascertain the proper venue. . . . It is true, of course, that this construction of the statute imports a jurisdictional element into a statute relating to venue but there is nothing to prevent Congress from drawing a venue statute in such terms and we think that in this instance it did so."

The decision of the court below is in accord with the well defined intention of Congress to limit rather than to expand the venue in civil actions. If hardship results to the petitioner, it comes by reason of his own selection, for he could have joined all of the defendants in this action in the State court in Delaware and, there, could have served them with process as effectively as in the Federal Court.

We submit that the Circuit Court's action in affirming the dismissal of the complaint as to the non-resident defendants, Johnson, Murphy and Herndon, was without error.

B. The Enactment of the Revised Judicial Code Repealing Old Section 51 Robs the Question of All Public Importance.

The Circuit Court's construction of the now repealed Section 51 of the Judicial Code, which was the crucial point before the court below, is now devoid of public interest and importance. The broadened and greatly clarified statements of rules regarding venue, derivative stockholder actions, and service of process, now found in Secs. 1391, 1401

and 1695 of Revised Title 28 U. S. C. are not helped by construction by this Court of the repealed Section 51. The amendments have, we believe, clarified the rules formerly embodied in the provisos and exceptions to old Section 51. If the new statutes require amplification by construction, and we submit they do not, it should be supplied directly on a record squarely presenting such an issue and not obliquely in the present case which is controlled by the now repealed Section 51 of the Judicial Code. Either the amendments clarify the meaning of the former statute, or they close a chapter on procedural matters and make determination of the matter here presented of limited, if of any, importance.

C. Section 1406 (a) of the Revised Judicial Code Has No Retroactive Effect and Is Inapplicable.

Petitioner's final argument is that if venue in Delaware as to these three respondents was improper, yet the Circuit Court should have applied Section 1406 (a) of Revised Title 28 U. S. Code, which became effective subsequent to the entry of the judgment appealed from and the Court's failure so to do was error. That section of the Code provides:

> "(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

The petitioner cites a number of cases in an attempt to show that these three individual respondents have no vested interest in *venue*. Those cases are not in point either in principle or fact. The petitioner, of necessity, ignores the fact that these respondents obtained a judgment of dismissal under the then controlling statute. Certainly the dismissal order of the District Court was proper when entered, at least as to these defendants. The dismissal of the complaint as to them was a final and conclusive judgment in which they have a substantive right if it was as to them

free from error. The petitioner himself has pointed out that in one of the causes of action, the ninth, these three individuals were the only defendants ever served. The circumstance that in other causes of action, embodied in the same complaint, errors as to venue over other defendants kept an appeal alive in the Circuit Court should not affect the rights of these respondents who had rightly been dismissed from all of the causes of action.

The point is forcefully made by Judge Maris (who was a member of the Advisory Committee appointed by this Court to collaborate with the Congressional Committee to carry forward the revisions in the Judicial Code), when, speaking for the Court below in the instant case, he said:

> "That section [1406 (a)] was not in force on March 6, 1948, however, when the judgment here under review was entered. On that date the non-resident defendants were entitled, under the law as it then stood, to the dismissal of the complaint as to them. Moreover, the court then had no power to transfer the case even if it had been asked to do so. On this appeal, however, we are called upon to determine only whether the district court erred, at the time it acted, in dismissing the complaint as to these defendants. For us now to apply this subsequently enacted provision of Section 1406 (a) would involve the retroactive annulment of a judgment validly entered by the district court. This the statute did not and could not do." [Words added.]

A contrary ruling by the Circuit Court or by this Court would involve the retroactive annulment of many judgments of dismissal for improper venue heretofore entered by the Federal District Courts throughout the country.

The petitioner's argument based upon Section 1406 (a) is without merit. That section permits transfer of a case to a "district or division in which it could have been brought". Obviously, there is no district in which all the defendants reside. Even the most ingenious analysis of

multiple residence concepts indulged in by the petitioner cannot tie Herndon, a Texas resident, Johnson and Murphy, Colorado residents, into residents of a single district. Hence, transfer could be *considered only* with reference to the Northern District of Illinois, where plaintiff resides.

Could this action have been brought in the Northern District of Illinois? The answer is no, for if it had been brought there originally, service upon each of these three individual respondents could not in regular course have been obtained, since Illinois is not a state in which any of them resides. To have served any of them there would have been merely fortuitous, if not impossible. We submit, then, that Section 1406 (a) is not satisfied when impossible problems in service of process are developed by attempts to apply it. Moreover, even if such a transfer were ordered under Section 1406 (a), these respondents would have to be given the opportunity to move to quash the process served in Delaware for illegality of place of service. As to the illegality of service in this connection Section 1693 of the Revised Judicial Code is of the utmost significance. It provides:

> "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court."

This statute, by its very language, would entitle the three individual respondents to quash the service of process if the instant litigation were transferred to the Northern District of Illinois.

Not enough time has passed for judicial construction of Section 1406 (a) of the Code. We predict, however, that it will not finally be interpreted as a means by which all geographical restriction upon service of process can be avoided by the simple expedient of making deliberate choice of a wrongful venue and then hoping the action will bounce back into the plaintiff's home district, with otherwise unattainable service of process attached. Before the ramifications of that sort of practice are clarified by a ruling

of this Court, records built up by timely motions restricting transfer or to quash service made during the interval of wrongful venue must be presented and ruled upon by the trial courts. The procedure of certiorari addressed to a record made *before* the amendments were enacted is ill adapted to permanent clarification of such a point.

II.

The Circuit Court's Decision Is Not in Conflict With Decisions of This Court or Other Circuit Courts.

As bearing upon petitioner's further suggestions (Petition, pp. 8-10) that the decision below is in conflict with decisions of this Court as well as decisions in other Circuit Courts, it is to be noted that, in the opinion below, the Court said (R. 215):

> "The question is one of first impression in the courts of appeals."

Moreover, Judge Maris quoted from *King v. Wall & Beaver Corp.*, 145 F. (2d) 377 (C. A. D. C., 1944) in support of the Court's decision. As to the conflict with cases of this Court, it need only be pointed out that the Circuit Court largely depended upon the law as announced by this Court to reach its decision. (See cases cited in footnotes to opinion—R. pp. 215-217.) As to the applicability of Section 1406 (a), petitioner cites certain decisions of this Court purporting to be at variance with the lower court's decision in this case. (Petition, p. 10.) An analysis of those decisions, however, indicates that petitioner ignores the fact that those cases dealt with what the Court regarded as matters of great national concern rather than with individual rights, a distinction which was made in *United States v. Schooner Peggy*, 1 Cranch. 103, 110 (1801), and which has since been continuously recognized by this Court.

By no stretch of the imagination can the case of *Brotherhood of Locomotive Firemen v. Graham, et al.*, as yet unreported (R. pp. 229-239), relied upon so heavily by

petitioner, be construed as in conflict with the opinion below in this case, because of its obvious factual difference. In that case the motion to dismiss for improper venue had been denied by the District Court; hence no dismissal had as yet occurred when the case reached the Appellate Court. Pending the appeal Section 1406 (a) became effective. Manifestly, there was no vested or substantive right in the District Court's order denying a motion to dismiss.

CONCLUSION.

The decision of the Circuit Court of Appeals was clearly correct upon the narrow issue presented and it is not in conflict with decisions of this Court or of other Circuit Courts. Moreover, the construction of Section 51 of the Judicial Code of 1911, as amended in 1936, is now moot and without public interest in so far as future litigation is concerned since its repeal and replacement by Sections 1391, 1401, 1695 and 1406 (a), Revised Title 28 U. S. C.

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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